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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 693

NORMAN BAKER, R. A. BELLOWS, AND
J. L. STATLER, PETITIONERS,

VS.

THE UNITED STATES OF AMERICA.

REPLY TO GOVERNMENT'S BRIEF.

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MAY IT PLEASE THE COURT:

In responding to certain arguments and statements in the Government brief which seemed to call for a reply, we shall not attempt to follow the order in which they are set out in that brief.

I. GOVERNMENT BRIEF INACCURATE AND MISLEADING.

The incomplete, inaccurate and misleading statement of facts at pages 4-11 of the Government brief, due, we assume, to inadvertance or lack of familiarity with the record, presents a picture of the case that does not bear a family resemblance to that presented by the evidence, considered as a whole.

In purporting to state the material facts, Governmer counsel disregarded the principle of *"completeness"* tha should be considered in determining the impression intend ed to be conveyed by a statement or an utterance (Wigmor 3rd ed., Sections 1040, 2099).

In selecting and quoting particular sentences or para graphs, taken from literature of various kinds, publishe over a ten year period, Government counsel not only di regarded the context in which such sentences or para graphs appear but also the time, place and circumstance under which they were written, and likewise by whom wri ten. Such a method naturally produces a distorted pictur of the case.

To illustrate:

(1) In 1929, a progress report, not a claim of cures, wa made with respect to five test patients, treated by D Ozias, in TNT Magazine, edited by Murray King (R. 8 96, 638).

The accuracy of that article, as it states the results of th earlier treatment of these patients, is affirmatively show by the record (R. 638).

In February following, the death of one of these patient was reported in the TNT Magazine, but subsequent article made no further reference to the results of their treatmen However, the December, 1929, article and several late articles, dealing with other cases, were bound together i a pamphlet, referred to in the record as the "Cancer Re print" (R. 80). But there was neither evidence nor clai in the record that this cancer reprint was distributed afte the early part of 1931 (R. 73, 76).

In 1934, five years before the indictment and trial of petitioners, a statement in regard to these five test patients was set out in a catalogue published by the Baker Hospital, this expressly reciting that all five of them discontinued the treatment, that none of them was cured of cancer, that three of them had died under circumstances therein stated, and that the remaining two were probably dead (R. 739-741). Substantially, the same statement was made in a biography of Baker, published in 1936 (R. 172-181).

Bellows who made the original report in 1929, had nothing to do with the preparation or distribution of literature circulated by the hospitals, had never read the story of the test patients, set out in the biography of Baker (R. 632), and when he first testified did not recall any statement that had been made by the hospital in regard to the five test patients, but upon going through its records, found the 1934 catalogue and on being recalled to the witness stand identified the statement that appears at pages 739-741 of the record (R. 739).

At page 9 of their brief, Government counsel assert that Bellows learned of the death of the five patients at a trial in 1932 to which Baker was a party, but that witness stated that he did not learn of the death of one of them till he heard the son of that patient testify at the trial of petitioners (R. 627).

So far as the record discloses, Alvin Winston, author of the book, "Doctors, Dynamiters and Gunmen," which the Government brief says "purported to be a biography" (p. 6) of Baker, and which in fact was such a biography, selling at $1.00 a copy, had no connection with Baker or any of petitioners.

Disregarding time, place, circumstances, authorship, a
the undisputed earlier response of the five test patients
the treatment given them by Dr. Ozias, the Governme
brief at pages 8, 9 thereof, attempts to establish an inf
ence that these patients had been represented as cured
a cancer treatment when in fact they died of cancer.
drawing that inference, they also ignore the later publi
tions, showing that all of the five discontinued the tre
ment and that not one of them had been cured (R. 741, 18

In discussing the facts, the Government brief at page
says the literature was "filled with *supposed* case histor
and testimonials of cures . . . and quotations attributed
medical authorities."

Why the use of the word "supposed" when the lite
ture, containing such was introduced as Government E
hibits without any attempt to impeach any of these recit
of cures? The Government did attempt to impeach
"quotations attribtued to medical authorities," doing th
however, by unsupported assertions, made as of the p
sonal knowledge of the Government attorney, in the c
cluding argument, and not by evidence (R. 870, 873, 88

Is it not significant that the Government attack was
stricted to claims of cures that were not made and d
regarded the scores of claims of cures that were made?

Page 8, line 27, the statements that the test patie
"were not in fact benefited by the treatment" is not
accordance with the record which shows without dispu
that all of these patients were reported by Dr. Ozias (
620) to have improved under the treatment. This testimo
was uncontradicted.

Furthermore, the misrepresentation charged (No. 10, Rec. 2) related to patients treated by defendants and not patients treated by Dr. Ozias.

Page 9, line 25, is misleading because it quotes testimony as to carbolic acid alone as if such testimony related to the compound of phenol, alcohol and glycerin. It is common knowledge that pure carbolic acid would destroy healthy tissues. It stands undisputed in the record that *the compound would not* destroy nor even injure healthy tissues. (Rec. 552.)

Page 10, line 9, counsel refer to vaginal packs being given by a practical nurse, but there was no evidence that they were not given under the direct supervision of a physician nor that she was incompetent to give them under such direction.

Page 10, line 13, the statement that Dr. Beatty admitted he knew nothing about cancer is not true. He made no such admission and no such admission appears in the record.

Page 10, line 15, there was no evidence to charge petitioners with knowledge of any irregularity on the part of Beatty in obtaining his medical diploma and the only testimony of any such irregularity was that of a convicted felon who hoped to obtain a parole. (Rec. 437.)

Page 11, lines 1 to 5, it should be noted that the conversation regarding keeping the radio station open was at a time when the Baker Hospital was being operated by Dr. Potter as lessee and not by Mr. Baker.

Page 12, line 15, quotes only a few words of Dr. Perdue regarding cancer, but entirely omits the various steps that

"breaks the tissue, the epithelium, that becomes cancer and starts to grow" and goes on growing as a parasite upon the human body until it kills it. (Rec. 548.)

Page 12, line 17, refers to a method of diagnosis by the Abrams diagnostic machine, but carefully omits the evidence that *neither defendants nor Perdue himself had or used* any Abrams diagnostic machine, as well as the testimony of Dr. Perdue (Rec. 563) that "it is not necessary to use that method of diagnosing cancer, but they are visible to the eye and *clinical methods are nearly always used,* and by clinical methods I mean observation and examination"; also "that the experienced diagnostician or doctor who is experienced in treating many cancer patients *nearly always* is able to tell by clinical examination without the use of biopsy or the Abrams machine whether one is suffering from cancer." (Rec. 563.)

Counsel say, page 13, line 22, that the prosecuting attorneys' conduct arguing the test cases was justifiable, referring to Rec. 794 to 800, but the record shows conclusively that the printed matter introduced contained the various express statements that *the test patiens were not cured,* set out in Petitioners' supporting brief, pages 23 to 27. (Rec. 183, 739-741, 87 to 92, inclusive, 170 to 179, inclusive.)

Counsel for Respondent (Respondent's argument, page 13, line 25, and note 3 on page 16) also refer to the argument of the prosecution as justified regarding the guarantee, but neglect to call the Court's attention to the fact that when the prosecuting attorney *stated to the jury* that defendants represented and published "We guarantee a cure" (Rec. 869, line 20) it was either *an inexcusable mistake or a wilful falsehood.*

The representations actually made by defendant were "We guarantee our cure" (Rec. 219) with reference to the patient guarantee (Rec. 28, 37, 261, 265) agreeing to treat free any patient who suffers a recurrence in the same site treated "after we have discharged the patient *as cured.*" (Rec. 262.) Obviously, "cures" meant cured patients.

There was no guarantee to cure all cases nor all patients. They did guarantee to treat free their cures—that is, patients discharged as cured in case they suffered a recurrence, and that was all, and all that could be reasonably understood from their literature.

II. MISCONDUCT OF GOVERNMENT COUNSEL.

In its reply brief the Government does not challenge the accuracy of a single statement in our petition and brief with respect to the misconduct of the government attorneys in the trial of the case, but that reply is largely a plea of confession and avoidance.

Its defense of the claimed misconduct is restricted to three instances among those challenged by petitioners as prejudicial, these being the "prosecuting attorney's argument to the jury with respect to the test cases (R. 794-800) and the guaranty (R. 869) and the close of his summation (R. 805)." (See Government's brief p. 13.)

The consequences of other prejudicial acts of misconduct are sought to be avoided on the ground that they were either not challenged or were corrected by the trial court (Government's brief p. 13).

The inexcusable distortion by the Government attorney of statements in regard to the test patients that appeared

in the book "Doctors, Dynamiters and Gunmen," was set forth in sufficient detail in the petition (pp. 6-9) and what was there said will not be repeated.

But in view of the defense of that argument in the Government brief, we ask on what theory an argument can be defended as "justifiable" when a book that expressly states that only one of six test patients, commencing at the same time a cancer treatment, completed that treatment and was cured, that the other five abandoned the treatment, that two of these five who discontinued the treatment were dead and the fate of the remaining three was unknown to the author (R. 172-182) is represented by that argument as claiming that all these patients (including those the book stated were dead) were "well" and had been "cured" by the treatment?

The claimed justification at page 13 of the Government brief with respect to the argument on the guaranty is effectively answered by the foot note to page 16 of that brief, this setting out the material parts of the guaranty, the allegation of the indictment relating thereto, and citing the page of the record where the argument, almost identical with the allegation of the indictment, appears.

Both the allegation of the indictment and the argument were something more than a distortion of the language of the guaranty. Each read into the guaranty language that was not there and could not be put there even by a strained construction of its plain and unambiguous terms.

The summation (R. 805), defended in the government's brief, was equivalent to an assertion by the government attorney that the jurors would perjure themselves if they

returned a verdict of not guilty. If such an assertion or implication, flung in the face of the jurors by a "servant of the law," charged with the duty of protecting the right of the accused to a fair trial (*Berger vs. U. S.* 295 U. S. 78), is legitimate argument, such should be authoritatively so declared by this court in order that attorneys representing the accused in criminal cases may not unduly trespass upon the time of appellate courts by seeking reversal on the ground of expressions of personal opinions, however extreme, by public prosecutors.

At page 13 of its brief, the Government apparently contends that this argument (R. 805) was corrected by action of the trial court. But that court sanctioned the argument (R. 805) and gave the jury no instructions that would correct its prejudicial implications.

In seeking to avoid the prejudicial consequences of statements made in argument or during the examination of witnesses on the grounds that these either were not challenged by petitioners or were corrected by action of the court, government counsel disregard the established principle that the cumulative effect of such acts of misconduct should be considered in determining the probable prejudice resulting therefrom (*Berger v. U. S.* 295 U. S. 78).

In the petition and supporting brief, we cited only a few of the many flagrant acts of misconduct that clutter the record.

These acts of misconduct were so numerous, persistent, and continuous that planned unfairness is the only reasonable explanation thereof, and the many serious violations of rules of law, evidence, and procedure committed by the public prosecutors in their determination to secure a con-

viction by any means, fair or foul, that would accomplish that purpose, clearly bring the case within the operation of the rule pronounced by the Circuit Court of Appeals for the 3rd Circuit, *U. S. v. Sprengel*, 103 F. 2nd (876-884) in which the judgment of conviction was reversed because there were so many errors in the conduct of the trial that the Court could not say that the accused was fairly convicted, this action being taken despite the view of the court that the evidence justified a conviction.

The government contention made at page 13 of its brief that corrective action, taken by the trial court, cured many of the errors committed by the government attorneys, disregards the established principle that where the "error committed appears to have been of so sharp a nature that it must have affected the minds of the jury despite the correction by the court," it is not cured by such attempted correction (*Waldron v. Waldron*, 156 U. S. at page 361; *Pharr v. U. S.*, 6th Circuit, 48 F. 2d 767-770).

That principle applies with peculiar force where many extraneous, prejudicial matters are brought to the attention of the jury by improper questions or statements of the public prosecutor.

How could any ruling of the trial court remove from the minds of the jurors the impression created by the information conveyed to it as the result of improper questions or statements of the prosecuting attorneys that petitioner Baker had a witness "fake a letter" (R. 351); that the treatment "ate a hole in the bladder" of a woman patient at the Baker Hospital (R. 310, 317); that a man at the Baker Hospital who was "not a doctor," did not "pretend to be a doctor," was allowed to do "a doctor's work" (R.

312), and by the statement of the contents of the fraud order, issued against Dr. Perdue, made to the jury by the public prosecutor in defiance of the ruling of the court?

The effort to remove such impressions by an instruction to disregard the information would be as futile as sponging a scratched slate in an effort to make smooth its surface.

The cumulative effect of these extraneous matters, improperly conveyed to the jury, was just as prejudicial to the accused as if they had been received in evidence over their objection (*Skuy vs. U. S.*, 8th Circuit, 261 F. 316).

According to the authorities, including decisions of this Court, cited at page 4 of our brief in support of the Petition for Certiorari, it is the duty of federal reviewing courts to apply corrective process to any substantial violation of the constitutional right to a trial upon the law and the evidence, regardless of objection, exception, motion, or assignment of error, and while that principle is also disregarded in the government brief, there is a special reason for its application to the misconduct complained of in the instant case.

An examination of the record will disclose that rulings of the court, promises made by the government attorneys not to make statements of matters not in evidence, and the trial court's reprimand of the District Attorney, were wholly ineffective in preventing these attorneys from deliberately bringing to the attention of the jury prejudicial matters that had not been established by the evidence or that had been excluded from the consideration of the jury by rulings of the court.

In connection with the first of the corrective rulings (R. 306), referred to at page 13 of the government's brief,

relating to the statement of a matter not in evidence, the District Attorney, after the court had sustained an objection to statements made by him, stated that he would not make remarks concerning matters not in evidence (R. 306), but during his examination of the very next witness he violated that promise with respect to a material matter (R. 310-312).

But that is not all. During the examination of Dr. Perdue, the District Attorney sought to introduce in evidence a fraud order that had been issued against that witness, persisting in that effort after three adverse rulings by the trial court, and desisting only when reprimanded and ordered to take his seat. (R. 547-548.) No effort was thereafter made to introduce this fraud order in evidence, but the government attorney did attempt to prove by the witness the issuance of a fraud order against another person. Objection, however, made by petitioners' counsel, was sustained by the Court (R. 570). But the emphatic rulings of the trial court, obviously correct (R. 548), with respect to the fraud order against the witness Perdue, and the similar ruling when a latter effort was made to show the issuance of a fraud order against another person (R. 570), did not prevent government counsel, concluding his argument, from specifically referring to the fraud order issued against Dr. Perdue, and stating the contents thereof to the jury (R. 873).

The Court of Appeals, while denouncing the original efforts of the public prosecutor to get this fraud order before the jury, as "outrageous," "unethical" and "highly reprehensible," held that it was harmless error because the matters which he so strenuously sought to bring before the jury, despite the adverse rulings of the trial court, were

later shown by competent evidence. But the fraud order was not introduced in evidence at all. It was brought to the attention of the jury by an argument which defied the previous rulings of the trial court to an extent that constituted contempt of court.

Why the Circuit Court of Appeals could have confused the bringing of the fraud order to the attention of the jury by improper argument with proof thereof by competent evidence, is not explained in the record. But whatever may have been the cause of this unexplained confusion as to its route of travel to the jury, it is clear of doubt that earlier misconduct of a public prosecutor, relating to a material matter, is not converted into harmless error by later misconduct of a worse character, relating to the same matter.

In seeking to avoid the prejudicial consequences of the misconduct of the government attorneys, the government brief insists that one feature thereof, sharply denounced by the Court of Appeals, merely tended to discredit the witness Perdue (Br. p. 12). But the determination of the credibility of witnesses is peculiarly a function of the jury. *Beckham vs. Hines*, 279 Fed. 242 (8 C. C. A.); *Bristol Gas and Electric Company vs. Bay*, 261 Fed. 297 (6 C. C. A.); *Big Brushy Coal Co. vs. Williamson*, 176 Fed. 529, 532 (6 C. C. A.). It therefore follows that the improper injection into a jury trial of extraneous matters substantially affecting the credibility of the accused or any material witness is prejudicial error and ordinarily incurable error. *Rau vs. United States*, 260 Fed. 131 (2 C. C. A.). See also *Ballard vs. U. S.*, 245 Fed. 837, and *Sager vs. U. S.*, 49 Fed. (2d) 725 (4 C. C. A.). And where the extraneous matter affects the credibility of a witness it is entirely immaterial whether that witness is the accused or someone else. *People vs. Mor-*

rison, 195 N. Y. 116, 88 N. E. 21; *Coulson vs. U. S.,* 10th Cir., 51 F. 2d 178.

To avoid the prejudicial consequences of the misconduct under consideration government counsel rely on the "weight of the evidence of guilt" (Brief 14).

As we construe that evidence, if sufficient to take that case to the jury at all, it was barely so, but the weight of incriminating evidence does not justify a disregard of fundamental rights. *Snyder vs. Mass.,* 291 U. S. 97. There is nothing in the case of *United States v. Socony-Vacuum Oil Company,* 310 U. S. 150, 237, cited at page 14 of the government brief, that holds to the contrary.

In that case, the majority opinion states a limitation on the consideration of the weight of the evidence in determining whether misconduct is ground for reversal, saying:

> "Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial."

Such is the situation shown by the record here.

The venomous appeals to passion and prejudice, including such masterpieces of insinuating invective as the reference to a "pole cat" in discussing Baker's good faith (R. 801), and the inexcusable transgressions by the Government attorneys of the cardinal rule in our system of criminal jurisprudence that verdicts must be based solely on the law and the evidence, can not be condoned under the harmless error rule unless in the application of that rule the doctrine that the end justifies the means is to be raised above the due process requirements of the Federal Constitution.

In concluding its defense of the misconduct of the public prosecutors, the government brief says that the claim that it impaired the fairness of the trial rests on "trivial grounds" (Br. p. 14).

Is it "trivial" for a public prosecutor to twist and distort the evidence in a case of the character here presented?

Is it "trivial" to appeal to class prejudice by asserting without basis therefor in the evidence that the accused has gotten rich by robbing the victims of a terrible disease?

Is it "trivial" to insinuate without a scintilla of supporting evidence that photographs, introduced in evidence, have been "dressed up" in order to picture what is untrue?

Is it "trivial" to make statements of material matters that have not been proven in evidence or to seek to overthrow the sworn testimony of witnesses by the unsworn declarations of a public prosecutor?

Is it "trivial" for a public prosecutor to put pressure upon the jury by repeated and pronounced expressions of personal opinions that the accused is guilty, and to state that any verdict except that of guilt would be a false verdict?

If these are trivialities, what does it take to constitute serious infractions by a public prosecutor of rules of fairness generally accepted as fundamental in the conduct of criminal prosecutions?

In addition to the "stereotyped argument," so often presented by public prosecutors whose unrestrained zeal has gotten before the jury extraneous facts calculated to

prejudice it against the accused, that the misconduct was harmless error, an argument that should not find favor with the court (*Coulston v. U. S.*, 10th Cir., 51 F. 2d 179, 182), petitioners' contention that extraneous facts, improperly gotten before the jury, were seriously prejudicial to their defense, is met with the insistence that a motion should have been made for a mistrial.

That insistence seems to be adequately answered by *Pierce v. United States*, 86 Fed. 949, but, in addition to what is there said, we make two observations, towit:

(1) Here we do not have just one error but multiple transgressions whose cumulative effect was destructive of the fairness of the trial. The motion for a mistrial is not adapted to cumulative errors. There would be no error in overruling it till the increasing pile of prejudicial matters had accumulated to the point of incurable error, and in order that the overruling thereof might be available as error on appeal, it would have to be renewed when an additional error was committed. The repeated making of such a motion would be highly prejudicial in its effect on the jury.

(2) *Berger v. U. S.*, 295 U. S. 78, suggests that under circumstances shown by that record, almost identical with those here existing, that a mistrial should have been ordered by the court on his own motion. But be that as it may, if the accused is required to make such a motion in the situation presented by the record here, this Court should so declare in order that the right of a fair trial may not be lost through technical procedural error, and the point involved presents a question of general importance.

If personal animus against petitioners had governed the conduct of the public prosecutors, there would have been no increase in the broad side of vituperative epithets that was directed against petitioners by these prosecutors. Such words and phrases as "*vicious fraud,*" "damnable fraud," "rotten to the core" clutter the arguments of the government attorneys (R. 804, 885), and in order that there might be no doubt as to what they meant by such invective they charged that petitioners schemed and planned to bleed patients of their last dollar and let them die (R. 864, 804), this being equivalent to a charge that they were killers for money, and made in the face of the fact that no person had testified that he was deceived or defrauded or misled by petitioners or that any one to whom he was related or with whom he was acquainted was deceived or defrauded or misled by them. Whatever may be the conclusions that can be drawn from isolated paragraphs, snatched from their connection or construed apart from the statement in which such paragraphs appeared, there is one outstanding, undisputed fact in this record that should be considered in connection with the extremely bitter attack made on petitioners in the arguments for the prosecution. It is this: All the literature and representations made by petitioners, promoting their cancer remedy, contemplated a personal interview with, and an examination of, every person treated at a Baker Hospital, and there is not a scintilla of evidence that a single deceptive word was spoken by any of petitioners or by hospital authorities in these face to face interviews.

Petitioners may have been mistaken as to the efficiency of their remedies but there is no evidence of any lack of candor in their dealings with patients at the Baker Hospitals nor any evidence of complaint on the part of such patients or their relatives or friends.

The record herein is stuffed with extraneous, prejudicial matters, improperly injected into the proceedings by the prosecuting attorneys, and bristles with their appeals to passion and prejudice. To call such a proceeding a fair trial, is an abuse of language.

In some instances, the trial court sustained objections to acts of misconduct complained of, but the mischief of the foreign matters, improperly injected into the proceedings, had already been accomplished, and therefore the rulings did not correct the prejudicial consequences (*Berger v. U. S.*, 295 U. S. 97; *Pierce v. U. S.*, 86 Fed. 949).

But the instructions, comments and rulings of the trial court, considered as a whole, were so biased against the accused as to furnish a back ground that would intensify the prejudice resulting from the misconduct of the prosecuting attorneys. That the trial judge did not mean to be unfair is beside the point.

The narrow limits within which he restricted the defense of good faith, conditioning petitioners' right to rely on good faith as a defense upon their proving either that representations made by them were "true" or that such representations were made as the result of a "sound and proper investigation" (R. 898, 899); his cautionary instructions to prevent jurors being "misled" by the phrases "good faith" and "reasonable doubt" (R. 897, 903); his failure to rule when objection was made to the argument of the prosecuting attorney, asserting that quotations, concerning surgery, x-rays and radium as methods of treating cancer, were false, and that petitioners should have proved the truth and accuracy of such quotations, this objection being made on the ground that the burden rested on the Government to prove

that representations were false, and not on petitioners to disprove allegations of the indictment (R. 887); his indulgence of the prosecutors in asking leading questions, and the uniformity with which he exercised discretion against the petitioners, including the exclusion of moving pictures, taken in connection with treatments given at the Baker Hospital and showing the method of giving such treatments and the actual, visible, physical results therefrom in direct conflict with the conclusions of medical experts, testifying for the Government (R. 681)—all these and other instructions and rulings intensified the prejudicial consequences of the misconduct of the Government attorneys which to a considerable extent was licensed or sanctioned by the trial court.

III. THE EXCLUDED CASE HISTORIES WERE RELEVANT TO SHOW GOOD FAITH.

In arguing to the contrary (Government Brief pp. 14, 15), counsel for the Government make the singular contention that these case histories, showing information on which petitioners acted not only in diagnosing the diseases of the persons giving such histories but in their later treatment, were so prejudicial to the theory of the Government that they were properly excluded on that ground.

Where the evidence is relevant on the controlling issue in the case, and is not merely cumulative, its exclusion on the ground that it is prejudicial to the other party, would be an innovation in the law of evidence. Wigmore on Evidence, 3rd Ed., Section 1904, does not support the contention of the Government on this point.

The section referred to bears upon the relevance of circumstantial evidence in general, but has no reference to

evidence offered for the purpose of showing knowledge or good faith, but VI. Wigmore (3d Ed.), Sec. 1789, covers cases where the hearsay rule is not applicable. (Petitioner's Brief, p. 20.)

In discussing the principle that should be applied where good faith is an issue, Mr. Wigmore (Sec. 1789) approves this statement of the rule by Judge Miller in ***Friend v. Howell,*** 34 Md. 298, 308:

> "Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay."

Respondent also refers to the case of *Goldstein v. U. S.,* 63 F. (2d) 609 (8th C. C. A.), but that case is clearly distinguishable because the 302 letters had no bearing upon the knowledge or intent of the defendants. They were not res gestae. They were written after the transactions of the defendants in question.

In the case at bar the offers were to show information which was given to the defendants prior to the treatments of the patients. It included the history of their cases, including prior treatments and prior diagnoses which defendants plainly had a right to rely on in making the alleged misrepresentation No. 6 and also in forming an opinion as to whether their remedy did cure cancer.

At page 14 of its brief, the Government, conceding that the case histories were furnished hospital authorities and the information contained therein communicated to petitioners, also admits that the Circuit Court of Appeals was in error in its conclusion to the contrary (p. 14).

But at page 15, it is said: "Moreover, it was not shown that the defendants relied on the results in these cases to justify the claims they made for their treatments."

The short answer to that contention is that the evidence was not rejected on any such theory or claim but solely on the ground that it was hearsay (R. 460, 503). That evidence, according to the rule approved by Mr. Wigmore, as it related to the issue of good faith, was "*original and material evidence, and not hearsay.*"

However, the information in these case histories, including reports of prior medical diagnoses, was not only communicated to petitioners, as the Government now concedes, but the case histories, as an examination of the record at the pages cited by the Government in its brief, with respect to such histories (p. 8), will abundantly show, were a substantial part of the material on which the advertisements, claiming efficiency for the Baker remedies, were based.

IV. UNSUPPORTED ALLEGATIONS OF THE INDICTMENT SHOULD HAVE BEEN WITHDRAWN FROM THE CONSIDERATION OF THE JURY.

In arguing to the contrary (Br. 16), Government counsel obviously confuse the issue.

It may not be necessary to prove all the alleged false representations, but that is not the point presented. The error complained of was the refusal of the court on motion of petitioners to withdraw allegations not supported by evidence.

Goldstein v. United States, 63 F. (2d) 609, 612 (C. C. A. 8), cited at page 16 of the Government brief, instead of sup-

porting the position of the Government, clearly sustains the contention of petitioners that allegations in the indictment, neither proven nor attempted to be proven, should have been withdrawn from the consideration of the jury.

In that case, dealing with surplus allegations, the court said that the defendant "may ask the court to instruct the jury to disregard the surplus allegations and except to the denial of his request, and he may except to the charge of the court submitting to the jury for their consideration such allegation." (63 F. 2d, p. 612.)

Dillard v. U. S., 101 F. 2d, 829, referred to on the same page of the Government's brief, is another unfortunate citation for the Government. In that case no motion was made to withdraw unsupported allegations, and in emphasizing the failure to make such a motion, the court recognized, at least by implication, the right of a defendant to make it. See page 833 of the Opinion.

We again refer to *Goldstein vs. United States,* 63 F. (2d) 609-618, cited by the Government, where it is said:

> "The defendant argues that the court submitted the case to the jury upon a theory unsupported by any evidence."

Stating that no exceptions were taken, the court further pointed out that jurors were told that the important question was "whether the defendant had paid the prices for furs which he agreed to pay and whether if he didn't, that failure was intentional or due to honest mistake." Thus the lower court, in the Goldstein case, did limit the jury to the question which was supported by the evidence.

The rule that the Court should limit the consideration of the jury to issues made by the pleadings and the evidence is too well settled to need further citation or discussion of authorities, but see *Lewellen v. U. S.*, 223 F. 18-22; *Patterson v. U. S.*, 222 F. 599-649; *Chambliss v. U. S.*, 217 Fed. 158-157; *Taylor v. U. S.*, 193 Fed. 968-970. *Cowl v. U. S.*, 35 F. 2d 794, does not repudiate but follows that rule.

At page 17 of the Government's brief, discussing the point under consideration, this remarkable statement is made:

> "Moreover, even if the Court were obliged to instruct the jury that particular representations were unproved, it would be necessary to show that its failure to do so resulted in prejudice to the defendants."

As the error related to a substantial right—the right to have the case determined solely on issues made by the pleadings and the proof—the burden is upon the Government to show that the error was harmless, and not upon petitioners to establish that it resulted in prejudice. *Little vs. United States,* 73 F. (2d) (C. C. A. 10) 861; *Ah Fook Chang vs. United States,* 91 F. (2d) (C. C. A. 9) 807, 810.

However, we think that prejudice clearly appears from the refusal of the Court to withdraw unsupported allegations from the consideration of the jury.

In the case at bar there were sixteen means charged as having been devised to perpetrate the fraud in question. If it be assumed that the evidence showed defendants made representations Nos. 1 and 2 (which we do not concede), the fact remains that there was no evidence whatever to prove the truth of alleged misrepresentations Nos. 7, 9 and 10. There is absolutely no way that the court can look

into the mind of the jury. The court cannot say the jury based its verdict upon the alleged misrepresentations 1 and 2 rather than upon the alleged guarantee or the alleged misrepresentation as to pictures of patients cured by defendants.

In the light of the extreme emphasis upon the test patients treated by Ozias and not by defendants and persistent false statements of the prosecuting attorneys that defendants guaranteed to treat free all patients not cured at their first stay at the hospital (Rec. 869), the only reasonable conclusion possible is that the jury did base its conviction upon that false argument and upon the unsupported misrepresentations (Rec. 79, 70).

It should be noted that while counsel for respondent refer to the statement, "We guarantee our cures" (Rec. 219), they utterly failed to point out anywhere any statement that the defendants agreed to treat free patients who were not cured at their first stay at the hospial, which was the substance of the alleged misrepresentation No. 9 (Rec. 2).

No such pretense was ever made by the defendants. The Government's own evidence (Rec. 314) shows that it was the regular practice at the Baker Hospital to continue treatments of patients on their first visit for from three to six weeks and then to send the patients home for a rest period for the medicine to take its effect and to allow nature to work, and then to have the patient return for a check-up and if necessary, to resume treatment for a similar period.

It is common knowledge that physicians generally make a practice of giving medicines intermittently. Many medi-

cines are given for a few days or a few weeks at a time and then discontinued to avoid overloading the system and after a period of rest, the same medicines are resumed for successive intermittent periods. This is shown without dispute to have been the practice of defendants, but nowhere is there any representation that patients not cured at first would be treated free on a second visit to the hospital.

V. MOTION FOR DIRECTED VERDICT SHOULD HAVE BEEN SUSTAINED.

We have pointed out that in its statement of the case respondent recites various items of evidence claimed to be suffcient to support the verdict of the jury. We now desire to point out that this evidence (in so far as it was correctly stated) did not meet the rule of circumstantial evidence that evidence must be inconsistent with innocence.

Page 4 and the first paragraph of page 5 obviously are just as consistent with innocence as with guilt.

Taking up the last paragraph on page 5, counsel say the treatments administered at the Baker institutions were "extravagantly advertised," but there was no charge in the indictment that defendants exaggerated a treatment having some merit. The whole trial was based upon the charge that defendants' treatments were absolutely worthless.

The evidence introduced by the Government itself shows a positive cure of Mr. Bellows (Rec. 108); the cure of "Mrs. B." (Rec. 110), which could hardly be regarded as less than a miracle, although what would be considered miraculous is obviously a matter of opinion.

The Government introduced evidence of the cure of "Mrs. C." (Rec. 116); a lady from Wayland (Rec. 132); a lady from Emporia (Rec. 133); a lady from Iowa Falls (Rec. 134); Mandus Johnson (Rec. 139); Miss Ward (Rec. 231 and 273); and many other cured patients. These cases amply justified a belief in the effectiveness of the Baker treatments and were totally inconsistent with the Government's theory that the Baker treatments were worthless. Add to these the undisputed cures of forty-five patients whom the court permitted to testify for defendants and the fifteen hundred more shown to have given letters of recommendation setting out their cure or improvement, all of which was entirely undisputed. Obviously, all of this evidence was inconsistent with guilt.

Regarding alleged misrepresentation No. 1 that radium, X-ray and surgical operations would not cure cancer, the Government kindly put in evidence facts which clearly justified defendants' making that representation when it introduced in evidence Exhibit No. 19 setting out at length quotations from Dr. Mayo, Francis Wood, J. Colt Bloodgood, Dr. MacFarlan, E. M. Perdue, Edward Reynolds, Dr. Loeb, Eli Jones, Thomas Edison, Dr. Buckley, Sir James Paget (Rec. pp. 247 to 255) without introducing a word of evidence to show that such quotations were not genuine.

Under *Young v. U. S.*, 97 F. (2d) 200, these statements were presumed to be true.

With reference to operations, it is a matter of common knowledge that operations do not cure. Amputating a foot for cancer does not cure the foot. Amputating a breast does not cure the breast. It removes it. Amputating an ear or a nose or an eye does not cure. It removes. As said by Dr.

James Ewing, "Operation means *removal and not cure in the real sense.*" Treatment of Cancer and Allied Diseases, Vol. 1, page 3.

The main reliance of the Government to show that the remedies were worthless, was the opinion of two expert witnesses, Drs. Wood and Cutler, who had never used nor seen the phenol compound in question used. While they testified to the effects of pure carbolic acid, they did not pretend to testify that they knew anything about the effect of the phenol compound constituting one of the Baker treatments. However, defendants were not chargeable with knowledge of the opinions of either Dr. Wood or Dr. Cutler and even if Cutler and Wood believed that cancer could not be cured by the Baker treatments, that was not inconsistent with an honest belief on the part of the defendants that it could be so cured.

It appears without dispute in the record that Worley J. Bishop, Mrs. John Pemberton, Henry Hollensteiner, T. N. Hemphill, C. F. Martins and J. W. Barbee (many others could be named) were treated and cured at the Baker Hospital of some serious ailment, these witnesses so testifying (R. 457, 525, 504, 528, 477). It also appears without dispute in the evidence, and from physicians from the hospital who diagnosed their cases there, that the persons named had cancers. The hospital diagnoses were the same as the prior medical diagnoses of these persons, made by their own personal physicians who had no connection with the Baker Hospital, but that is not the point we emphasize. That point is the undisputed testimony that these persons had cancer and were cured of that disease by the Baker treatment. Expert opinions, not based on personal observations, present no conflict with that testimony.

The Government complained (Br. 9, 10) that doctors gave injections at the hospital without knowledge of the medicines they were injecting, but it is nothing uncommon for a doctor to use medicine without an exact knowledge of the elements, and the proportions thereof, that make up the formula. Skill in diagnosing the case and in making the injections were all that was required and there is not a scintilla of evidence that the authorities at the Baker Hospital made incorrect diagnoses or that the injections were not properly made. This being true, it is immaterial whether one of these physicians made one injection or a thousand during the day, but the claim of a Government witness that he made three hundred injections in one morning, considering the time that would necessarily be required in going from room to room in a hospital, is obviously an exaggeration.

There is no evidence that Baker received a salary, commission or royalty from the hospital operated by a corporation in which he had two shares of stock, nor that he had any financial interest in a radio station in Mexico, other than that of a representative of the corporation that owned it, or that he had any kind of connection with a hospital at the time of the statement in regard to "suckers," and an anticipated profit therefrom, attributed to him by the witness Bunker. In that situation Bunker's testimony, aside from intrinsic evidence of the incredibility of that witness, is destitute of probative value on any issue presented by the record here.

CONCLUSION.

In closing its argument, the Government insists (Br. 19) that the petition does not show conflicting decisions or important questions.

As to the latter, we are content with what was said in stating the reasons why the petition should be granted.

As to the former, if the Court of Appeals in its opinion had held that in a case tried on an indictment charging that all allegations complained of were intentionally false and tried on the theory that the defendants had planned and executed a "*vicious fraud,*" the trial court could properly instruct the jury to convict if the alleged false representations were made "negligently" or without "proper investigation," such a holding would have presented a conflict in decisions that stood out in bold relief. But the Court of Appeals, while actually so holding, avoided a direct statement of the point decided by stating that no exception was made to the charge.

But such an exception was made (R. 9, 10).

Other direct conflicts with decisions of other circuits and of this Court were avoided in the same way, and while this was due to inadvertence or oversight, actualities, not mere surface appearances, should be the controlling consideration in determining the character of the questions presented by the petition here.

Respectfully submitted,

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